PROGRAM MATERIALS
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The Experience of Negotiating

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CELESQ CLE PRESENTATION ON NEGOTIATING

OUTLINE

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This program is based on materials contained in Siviglia, commercial Agreements - A Lawyer's guide to drafting and Negotiating, Thomson Reuters, supplemented annually.

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I. Introduction

The art of negotiating is embodied in the poetic and insightful words of the song "The Gambler", written by Don Schlitz:

You got to know when to hold 'em,
Know when to fold 'em,

Know when to walk away,
and know when to run.

Courses, books and lectures on negotiating provide guidance; but there's no substitute for experience. This program, therefore, is designed to provide guides to assist --- especially young lawyers -- in acquiring that experience and to promote confidence in your judgments.

II. The Four Fundamentals

1. Each of the principles identified in this Part and discussed during the program is illustrated by one or more real-life examples. Needless to say, you will find overlap among the examples.

Negotiating is all about the art of reading: Reading and understanding situations, much like great running backs who grasp the entire flow of the defense and their offensive line and know when to brake or slow down, and to cut, and to accelerate.

2. **BLIP**: The Four fundamentals of Negotiating

"**B**" stands for "Believability" and "Never Bluff". The situation will often reveal whether a party is bluffing.

"**L**" stands for Leverage and knowing how to use it. Leverage, when you have it, is the power that allows you, as the song goes, "to hold 'em"; and when you don't have it, cautions you "to fold 'em".

"**I**" stands for knowing what is "Important", not only to your client but to the other party.

And "**P**" stands for "Patience", a tough quality to master, especially when being pushed by an anxious, nervous client.

3. *Know when to yield*:

Don't overlawyer! Don't overnegotiate! Recall the example of the development site where the tenants had to be evacuated before

construction could begin.

4. Choose the right person to conduct the negotiation.

5. Settlement discussions in litigation: Park the guns at the door. Don't litigate the case when negotiating a settlement. Focus on a solution.

6. **Negotiating is the art of finding SOLUTIONS!** Great negotiators are great mediators because they find **solutions**. Hence, the Negotiator's Prayer:

LET THE PERSON ON THE OTHER SIDE OF THE TABLE BE THE SMARTEST PERSON IN THE WORLD

7. Resource Materials: Chapters 18, 19, 20 and 21 of Siviglia, *Commercial Agreements*, *supra*

II. Negotiating Some Specific Contacts and Contract Terms

1. Warranties; Indemnities; and Indemnities

A. It is reckless to rely solely on the warranties of the other party. The importance of diligent due diligence: "Goldman Sachs and the $580 Million Black Hole", June 15, 2012 Business Section of *The New York Times*.

B. Indemnities normally cover breach of covenants and breach of warranties, but they should also cover **third party claims containing allegations which, if true, would constitute a breach of warranty because, without that additional protection, the indemnitor has no obligation to pay litigation costs during the pendency of the litigation, and if there is no breach, litigation costs are not covered, and if the claim is settled, you'll have to bring a separate action to prove the breach and to collect litigation costs, which indemnities normally cover.** This enhanced coverage: **"claims containing allegations which, if true, would constitute a breach of warranty"**, is especially important when dealing with intellectual property.

Chapters 11 and 15 of *Commercial Agreements* deal extensively with acquisitions.

C. The warrantor should be responsible for its acts and omissions. But beyond the warranties, the buyer should rely in its own due diligence. Attached to this outline is a sample clause for that purpose.

2. Term Sheets and Letters of Intent

Each = a **detailed outline** of the **basic terms** of the deal to be sure that everyone is in agreement on the essential aspects of the transaction, **but the letter of intent is a signed document.**

Because they confirm agreement on the key terms, they facilitate drafting and negotiating the agreements.

Because of their transparency, they are excellent tools to vet the transaction with the client.

But Letters of Intent: Never!!! Though they proclaim that they do not create any obligations and are subject to execution of a definitive contract, they can provide a basis for litigation as they are signed documents.

For example, as I was working on the portion of *Commercial Agreements* dealing with term sheets and letters of intent, a case came into our firm based on an alleged breach of a signed letter of intent.

No client of mine has ever signed a letter of intent, and every law firm representing the other party to the transaction has always agreed to a term sheet instead of a letter of intent.

And in his review of *Commercial Agreements*, which appeared in the May 24, 1994 issue of the *New York Law Journal*, Philip Beaumont of the prestigious New York law firm, Chadbourne & Parke, wrote:

His recommendation, in Chapter 11, to avoid letters of intent at all

costs is also sound.

References Materials: *Commercial Agreements, supra*: §§11:1, 11:3, and 15:6.

3. Non-compete Clauses

Always Appropriate:

Protection of Trade Secrets (no time limit).

Solicitation of Employees and Customers limited to employees and customers at time of separation.

Restriction on post-employment activities must be addressed carefully and intelligently by both employer and employee. Depending on the circumstances, they may be inappropriate or unnecessarily too broad. Recall the geographical restrictions on the doctor when in the forbidden zone many other medical practices and doctors were competing with the employer's practice.

If included, they must be reasonable as to the Period and the Geographical Area of restriction.

Restrictions on post-employment activities should not apply if the employee is dismissed without cause or leaves because of a material breach by the employer.

Reference Materials: *Commercial Agreements*, *supra*, Chapter 6; "Non-Compete Clauses: A Reasoned Approach" NYSBA *Journal*, February, 2018.

4.Confidentiality Agreements

They protect against unauthorized use and disclosure of proprietary information.

False Sense of Security: Caution clients against putting much reliance on them. They are invitations to steal: *E.g.*, Huawei ignored its confidentiality agreements with T-Mobil and stole trade

secrets of T-Mobil.

They are difficult and costly to enforce.

Never disclose anything critical to the operation of the business such as a formula or algorithm or a customer list. Show what the IP does. Do not reveal information on how to create it or how to create a variation of it.

Two types:

One describes in general terms information that is confidential to the company, and then protects that information unless it falls within a specific exception.

The other protects only information identified in writing as confidential.

I prefer the former, *i.e.*, the one generally protecting furnished information subject to exceptions discussed below. The reason: the risk of forgetting to mark as confidential, information that is in fact confidential.

Expiration Date: None. A secret has no time limit. Imagine Coca Cola disclosing the Coke formula under a confidentiality agreement with an expiration date.

The obligation must be absolute: Nothing like "protecting the information in the same manner as the recipient protects its own trade secrets", because (A) the protection may not be adequate, and (B) if there is a leak, the party has a defense.

Exceptions to the Obligation of Confidentiality

Standard and Acceptable:

Information in the public domain or that enters the public domain without a breach of confidentiality;

Prior knowledge provided proof of that prior knowledge is furnished promptly.

To be avoided:

Information received from a third party on a non-confidential basis without breach of any obligation of confidentiality;

Information developed independently after disclosure and after a specified waiting period. (Ha!)

But if absolutely necessary, require proof of the exception, the identity of the third party making the disclosure and a waiting period before use or disclosure to allow time to assess the situation and to bring an action for injunctive relief.

Third party demands for disclosure:

Require notice and no disclosure unless required by law.

Prohibit disclosure before the last day on which disclosure is required by law.

Return information following abandonment of the deal.

Reference Materials: *Commercial Agreements*, *supra*, Chapter 16B. Also check the Topical Index under Confidentiality Agreements for specific situations.

5. Options

Leave nothing to negotiation following exercise of the option.

E.g., An option to purchase or to lease:

•include the entire purchase or lease agreement; specify how any blank spaces are to be completed;

•if a down payment or escrow payment is required, it should accompany exercise of the option;

•In the case of an option to lease, the first month's rental payment

should accompany exercise of the option;

•exercise of the option constitutes execution of the lease or purchase agreement.[1]

Reference Materials: Chapter 12 *Commercial Agreements, supra*. Also check the Topical Index under Options for specific situations.

6. Models and Boilerplate

Transactional lawyers are, as they must be, plagiarists, but in a good - not illegal -- way.

Models are helpful but dangerous: They can engender a false sense of security

Adaptation - Every provision must be examined carefully to determine the extent to which it is applicable and the changes that must be made to adapt it.

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[1] Below are allegations in a complaint filed in the New York State Supreme Court involving an option to purchase real estate in Manhattan. The option in question was written by two well-known New York law firms. The complaint stated:

> Pursuant to the Agreement, if [Plaintiff] exercised the option on or before January 31, 1995, then [Plaintiff] and [Defendant] were to enter into a definitive Contract of Sale of the Premises ... for the sum of $18,000,000 ... [with] a deposit in the sum of $1,800,000. The Agreement expressly provided that the Contract of Sale was to be "reasonably satisfactory to [Plaintiff] and its counsel."(emphasis supplied)
>
> Prior to January 1, 1995, [Plaintiff] attempted to exercise the option under the Agreement and advised defendant that it was ready, willing and able to enter into a contract of sale and make the required deposit.
>
> [Defendant], in response to [Plaintiff's] exercise of its option, proposed a contract of sale that contained terms that were not reasonably satisfactory to [Plaintiff] and its counsel. Among other things, [Defendant's] proposed contract (i) would have required ...(emphasis supplied)

..., and straight on 'til morning.

Little bit like buying a ready-made clothes: always needs alterations.

Take, for example, a standard, boilerplate clause prohibiting a party from transferring its rights under an agreement. Fair enough, as parties to a contract generally want to control with whom they are dealing. An absolute prohibition like that might be appropriate in a license agreement because the licensor derives its income from licensing its intellectual property, such as data. The licensor, therefore, does not want to allow a licensee to transfer its rights to that intellectual property to someone else, thereby depriving the licensor of another license fee.

As an added precaution, the licensor should consider adding a provision to the standard clause that a merger or consolidation, regardless of the surviving entity, will constitute a transfer. In some jurisdictions, like Texas, a merger may not be considered a transfer. Further, specifying "regardless of the surviving entity" is essential to protect against a "reverse" merger, in which the elephant merges into the flee -- in this case, merging the elephant into the licensee.

On the other hand, though, consider an absolute prohibition on transfer in a contract for the lease of equipment. That clause could interfere with an acquisition of the lessee. So in this case the lessee should probably require a provision to the effect that the acquisition of all or substantially all of lessee's business and assets will not be a prohibited transfer as long as the successor assumes all of lessee's obligations under the lease.

Reference Materials: *Commercial Agreements, supra*, §1:4

SAMPLE DUE DILIGENCE CLAUSE

The following clause should be written in bold or solid capital lettering. See UCC § 2-316 (2) and (3).

Buyer acknowledges and warrants to Seller that Buyer has made its own investigation with respect to all matters not covered by the express representations and warranties of Seller under this Agreement, that Buyer is fully satisfied with its investigation, that except for the express representations and warranties of Seller set forth in this Agreement, Buyer has relied solely on its own investigation, has not relied and will not rely on any statement or act or omission by Seller or by any officer, director, employee, agent, representative, attorney or *[shareholder // member]* of or advisor to Seller, whether written or oral and whether made before or after the date of this Agreement, that Buyer accepts all goods "AS IS", and that Buyer does not have and will not have and will not assert any claim whatsoever against Seller or any officer, director, employee, agent, representative, attorney *[or shareholder // member]* of or advisor to Seller except for claims against Seller as expressly stated in this Agreement for breach of an express representation, warranty or covenant of Seller under this Agreement.

Each such officer, director, employee, agent, representative, attorney, *[shareholder // member]* and advisor is a third-party beneficiary of the foregoing sentence.